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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE STATE OF ARIZONA

E.C.B., on behalf of himself and his minor
child, J.R.

Plaintiffs,

vs.

United States of America,

Defendant.

Case No. 2:22-cv-00915-CDB

**PLAINTIFFS' RESPONSE TO
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

INTRODUCTION

Plaintiffs, ECB (hereinafter "Elias") and his daughter, JR (hereinafter "Jocelin"), natives of Guatemala, brought suit under the Federal Tort Claims Act ("FTCA") against the United States

1 for damages occasioned by the human consequences of the government's unconstitutional family
2 separation policy. They fled Guatemala seeking asylum in the U.S. as a result of death threats
3 received by Elias in his home country. In filing suit, plaintiffs' cause of action joins a string of
4 similar cases brought before this Court, in which the government has unsuccessfully filed virtually
5 identical motions making the exact same legal arguments as made in the instant case. The
6 government's motions have been unanimously rejected in this District. *C.M. v. United States*, No.
7 LV-19-05217, PHX-SRB, 2020 U.S. Dist. LEXIS 252691, at *11 (D. Ariz. March 30, 2020);
8 *A.P.F. v. United States*, 492 F. Supp. 3d 989, 994 (D. Ariz. 2020); *A.I.I.L. v. Sessions*, No. CV-
9 19-00481-TUC-JHC, 2022 U.S. Dist. LEXIS 61582, at *29 (D. Ariz. March 31, 2022); *F.R. v.*
10 *United States*, No. CV-21-0038-PHX-DLR 2022 U.S. Dist. LEXIS 130605, at *16 (D. Ariz. July
11 22, 2022). Given this history, the Court should similarly reject the government's attempt to deny
12 plaintiffs the relief accorded to them by law.
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15 **BACKGROUND**

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17 In weighing a motion for summary judgment, the Court should accept as facts the
18 allegations in the complaint, along with all reasonable inferences. *Wolfe v. Strankman*, 392 F.3d
19 358, 362 (9th Cir. 2004).

20
21 Plaintiffs were enticed to enter the United States in the vicinity of Yuma, Arizona, by
22 Border Patrol agents who intimated to Elias that they would be granted asylum upon entry.
23 Complaint (Doc. 1) ¶ 71. The agents opened the gates of the border wall to allow Plaintiffs to
24 enter into the U.S. unobstructed and without interference from the agents. *Id.* However, upon
25 crossing the border, Plaintiffs were assaulted by the agents, detained, and transported to a Border
26 Patrol holding facility. *Id.* ¶ 72. This occurred on May 1, 2018, barely four weeks after the April

1 6, 2018, announcement by the Attorney General of the government's family separation policy
2 disguised as a "Zero Tolerance Policy". *Id.* ¶¶ 33-34, 71. The purpose of the policy was to deter
3 the influx of families from Central America seeking asylum along the southern border, by brutally
4 separating families, and deporting parents while waylaying their children in detention facilities in
5 the U.S. for prolonged periods of time. *Id.* ¶¶ 32-49.

7 Plaintiffs were deceived into entering the United States by Border Patrol agents for the
8 purpose of separating Elias from Jocelin, and thereby further the messaging of cruelty that the
9 family separation policy was meant to convey to asylum seekers. *Id.* ¶¶ 104-09. To that end, Elias
10 was summarily and wrongfully deported on May 21, 2022, while eight-year-old Jocelin was left
11 to languish in detention in the government's hands for five months. *Id.* ¶¶ 87-91.

13 While the unconstitutional treatment visited on Plaintiffs pursuant to the family separation
14 policy served the government's purpose of deterring irregular immigration by projecting a horrid
15 policy of child cruelty, the consequences on Elias and his young daughter were devastating. The
16 government placed Jocelin in a child detention facility administered by the Office of Refugee
17 Resettlement in Miami, Florida, where its unconstitutional and illegal actions against her
18 continued. *Id.* ¶¶ 2, 7, 88-91. Despite locating and communicating with Jocelin's mother in
19 Guatemala after her arrival at the detention center, Jocelin was kept in detention for five months
20 pending removal proceedings at the behest of agents of the Immigration and Customs
21 Enforcement (ICE), when she could have been immediately sent home. *Id.* ¶¶ 88-91. Indeed, she
22 was purposefully prevented from being reunited and sent home with her father when he was
23 deported and held in confinement for a prolonged period solely to advertise, and ramp up, the
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1 terror among would be asylum seekers in the U.S. occasioned by the family separation policy and
2 driving home its deterrent effects. *Id.* ¶¶ 104-09.

3
4 Moreover, while Jocelin was detained in Miami for five months, despite her mother
5 begging the government to release her and send her home, Elias was summarily deported 21 days
6 after his detention, after signing documents that he could not read, but “agreeing” thereby to
7 expedited removal on the false information that this was the only way he would be reunited with
8 Jocelin. *Id.* ¶¶ 86-87. Jocelin’s father was summarily deported, intentionally and illegally, to
9 prevent her reunification, and thereby occasion the deterrent effect of the government’s family
10 separation policy. *Id.* ¶¶ 104-09.

11
12 There was no need to separate Jocelin from her father, or for Elias to be deported without
13 his daughter. He was not charged with illegal entry, or with any other crime before his deportation.
14 Indeed, he entered at the invitation of Border Patrol agents, and was therefore not in the country
15 illegally when apprehended. Moreover, he was not transferred to a jail as a criminal defendant
16 before his deportation, which was the government’s pretext for the separation. The government
17 saw fit to physically separate him from his daughter and deprive them from each other for a
18 prolonged period of time despite Elias never having been prosecuted. Instead of reuniting them
19 for the flight home when Elias was deported 21 days after his detention by Border Patrol, Jocelin
20 was intentionally left behind by the government to further the goals of its family separation policy.
21 Indeed, the intentional prevention of young Jocelin’s reunification with her family for five months
22 is indicative of the government’s willful and cruel use of prolonged family separation as an
23 immigration tool with which to control irregular immigration at the border.
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1 The government failed to provide young Jocelin's family with any hope of reunification
2 throughout the five months of her detention and separation. There were no timelines; nothing to
3 give Jocelin any hope of eventual reunification. Indeed, the government suggested to Jocelin's
4 mother that adoption by a family in the U.S. was a possibility. In essence, there were no bounds
5 to the government's inhuman treatment of Jocelin in holding her as a virtual hostage for five
6 months in service of its unconstitutional policy.

8 STANDARD OF REVIEW

9 The government has filed a motion to dismiss for lack of subject matter jurisdiction
10 pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, it argues that the
11 FTCA is inapplicable because there is no plausible analogue at state law, and in the alternative,
12 that the government is immune to this suit under the discretionary function and due care
13 exceptions of the FTCA, and because plaintiffs proffer impermissible direct liability claims
14 against the government itself, as opposed to employees of the government. Where, as here, the
15 Defendant launches a facial attack on jurisdiction, the Court must accept as true all factual
16 allegations in the Complaint and deem all reasonable inferences in Plaintiffs' favor. *Wolfe*, 392
17 F3d at 362.

20 ARGUMENT

21 **I. The Discretionary Function Exception Does Not Apply.**

22 The discretionary function exception to the FTCA allows the government to evade liability
23 where the actions complained of involve judgment or choice *and* are based on considerations of
24 public policy. *C.M.*, 2020 U.S. Dist. LEXIS 252691 at *10. However, the discretionary function
25 exception does not apply where the employee has no choice but to adhere to the directive at issue.
26

1 *F.R.*, 2022 U.S. Dist. LEXIS 130606 at *14. Such occurs where the actions, and failure to act,
2 amount to a failure to adhere to constitutional mandates. The Constitution, for obvious reasons,
3 can limit the government's discretion under the FTCA, since no law can grant employees and
4 agents of the government the "discretion" to violate the Constitution. *Nurse v. United States*, 226
5 F.3d 996, 1002 n.2 (9th Cir. 2000) (holding that "the Constitution can limit the discretion of
6 federal officials such that the FTCA's discretionary function exception will not apply"); *see also*
7 *Fazaga v. Federal Bureau of Investigation*, 916 F.3d 1202, 1250-51 (9th Cir. 2019) (quoting
8 *Nurse*); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) ("We hold that the FTCA's
9 discretionary-function exception does not provide a blanket immunity against tortious conduct
10 that a plaintiff plausibly alleges also flouts a constitutional prescription.").

13 Border Patrol agents opened the gates to the border wall to lure Plaintiffs into crossing into
14 the U.S. so that the government could separate Plaintiffs and entrap them in the web of the family
15 separation policy. The government prevented the reunification of Jocelin with her father before
16 his deportation, and it held young Jocelin in a detention center for a prolonged period of time to
17 further the deterrent goals and effects of the government's policy of family separation. And the
18 government kept Jocelin and her family in the dark as to when or whether she would be released
19 to them, even suggesting that she be adopted by Americans so that she would never see her family
20 again. These things were all done to further the terror of the family separation policy, as designed
21 and intended by government agents to deter migrants from seeking asylum along the southern
22 border. The strategy was based on a program of terror aimed at the children of Central American
23 families with the temerity to seek refuge in the United States. The message was clear. If you enter
24 the U.S. with a child, we will take them from you and brutalize them, as the government did with
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1 Jocelin. The policy and its execution were nothing short of government campaign to commit child
2 abuse to elicit shock and dread among would-be asylum seekers. In the end, it was the children
3 who most suffered the human consequences of the government's family separation policy.
4 Clearly, these actions allege Constitutional violations of the highest order. *See Nurse*, 226 F.3d
5 at 1002 n.2; *Ms. L. v. United States Immigration and Customs Enf't.*, 310 F. Supp. 3d 1133, 1144-
6 46 (S.D. Cal. 2018) ("This practice of separating class members from their minor children, and
7 failing to reunify class members with those children, without any showing the parent is unfit or
8 presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their
9 due process claim.").

12 Finally, luring Plaintiffs to enter the U.S. for the purpose of separating and subjecting
13 plaintiffs to a regime of terror, purposefully preventing Plaintiffs' reunification for five months
14 and subjecting Jocelin to prolonged detention to send a message of child horror to potential
15 migrants in Central America and thereby deter migration, is not conduct susceptible to a
16 reasonable policy analysis. Not only is such conduct not susceptible to a reasonable policy
17 analysis, such conduct has been categorized as "egregious," "outrageous," a "shock [to] the
18 contemporary conscience," and interfering with rights "implied in the concept of ordered liberty,"
19 such that the conduct can be defined as "brutal" and so offensive "that it does not comport with
20 traditional ideas of fair play and decency." *Ms. L.*, 310 F. Supp. 3d at 1144-46. The *Ms. L* Court
21 held that family separation was a violation of due process.

24 Thus, because the Plaintiffs have plausibly alleged that their initial detention, their
25 subsequent separation, and Jocelin's prolonged detention violated their constitutional rights, the
26 discretionary function exception does not apply. *See F.R.*, 2022 U.S. Dist. LEXIS 130606 at **16-

1 17 (denying government motion to dismiss including discretionary function exception arguments,
2 citing rulings in parallel family separation cases).

3 **II. The Due Care Exception Does Not Apply.**

4
5 Defendants assert that the government is free from liability because it acted with due care
6 in separating Jocelin from her father and transferring her to ORR custody pursuant to 8 U.S.C. §
7 1232 (b)(3) within 48 hours. However, their argument misses the point. The government's pretext
8 for separating young Jocelin from her father was Elias' supposed criminal charge of entry without
9 inspection and subsequent transfer to an adult jail facility. The pretext was false, as shown by the
10 fact that the government did not charge Elias with a crime such that a separation was necessary.
11 Moreover, there was no statute or regulation requiring the separation. Rather, Jocelin was
12 separated from her father because of a cruel and clearly unconstitutional government policy, a
13 memorandum from the Attorney General designed to terrorize children and their families to effect
14 the deterrence of irregular immigration. The due care exception does not apply where a mere
15 policy, such as in the instant case, rather than a statute or regulation, mandated the conduct at
16 issue. *C.M.*, 2020 U.S. Dist. LEXIS 252691 at *9 (noting in parallel family separation case where
17 government argued due care exception that "family separation was established by executive
18 policy—not by a statute or regulation—which is not covered by the due care exception"); *see also*
19 *Gonzalez v. United States*, 2013 WL 942363, at *3-4 (C.D. Cal. March 11, 2013) (DCE only
20 applies where a statute "require(s) a mandatory cause of action"); *Buchanan v. United States*, 915
21 F.2d 969, 970-71 (5th Cir. 1990) (holding that due care exception applies only to "actions
22 mandated by statute or regulation").
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1 Because the government cannot point to a statute or regulation which mandates their luring
2 Plaintiffs into the United States so that father and daughter could be separated, a law mandating
3 their separation, or a statute preventing their reunification, the government's arguments seeking
4 dismissal of this action pursuant to the due care exception must fail.
5

6 **III. Plaintiffs' Tort Claims Satisfy the Broad Analogy Inquiry.**

7 The government contends that Plaintiffs cannot establish subject matter jurisdiction under
8 the FTCA because they cannot show, as required by the FTCA, that "a private individual under
9 like circumstances would be liable under state law." *United States v. Muniz*, 374 U.S. 150, 153
10 (1963). The Ninth Circuit requires courts "to find the most reasonable analogy" to private tortious
11 conduct. *Dugard v. United States*, 835 F.3d 915, 919 (9th Cir. 2016); *LaBarge v. Mariposa Cty.*,
12 798 F.2d 364, 367 (9th Cir. 1986).
13

14 A cause of action for loss of child consortium is well recognized at Arizona law. *Howard*
15 *Frank, M.D., P.C. v. Superior Court*, 150 Ariz. 228, 230, 722 P.2d 955 (1986) ("It is apparent . .
16 . that the award of consortium damages is a well-established remedy in Arizona for negligent
17 injury to family relations.") This right has been extended to children and parents. *Reben v. Ely*,
18 146 Ariz. 309, 312, 705 P.2d 1360 (1985); *Villarreal v. State Dept. of Transportation*, 160 Ariz.
19 474, 477, 774 P.2d 213 (1989). Private individuals have also been held liable for torts involving
20 intentional infliction of emotional distress and negligence in Arizona, as found by this Court.
21 *A.P.F. v. United States*, 492 F. Supp. 3d at 994 (citing *C.M.*, 2020 U.S. Dist. LEXIS 252691 and
22 other District of Arizona cases).
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1 Plaintiffs' complaint clearly shows that a private individual under like circumstances and
2 analogous to the government in the instant case would be liable under Arizona state law for
3 intentional infliction of emotional distress, negligence, and loss of consortium.
4

5 **IV. The Torts Pled by the Plaintiffs Do Not Seek Direct Liability Against the United**
6 **States and Are Not Systemic Tort Claims.**

7 The FTCA authorizes suits against the U.S. for tortious acts committed by agents of the
8 government. *Vander v. United States Dept. of Justice*, 268 F.3d 661, 663 (9th Cir. 2001); *Westbay*
9 *Steel Inc. v. United States*, 970 F.2d 648, 651 (9th Cir. 1992). The government contends in its
10 motion that Plaintiffs' complaint fails because it pleads institutional tort claims, rather than torts
11 based on the misconduct of individual employees.
12

13 While the FTCA's waiver of sovereign immunity does not encompass claims for the
14 tortious acts of the entire government, or agency, writ large, Plaintiffs complain of tortious
15 conduct by specific agents of the Border Patrol who decided to open the gates of the border wall
16 allowing entry to Plaintiffs for the purpose of separating them under false pretense. They complain
17 of agents of the Border Patrol who decided to separate Plaintiffs under the false pretext that it was
18 necessary to do so because Elias was to be charged with a crime and transferred to a jail facility.
19 They complain of agents of ICE who purposefully decided not to reunite Jocelin with her father
20 before he was deported, and agents of ICE who decided to prolong young Jocelin's detention and
21 prevented not only her reunification with her father before he was deported but also her
22 reunification with her Guatemalan family within a reasonable time after her detention. All these
23 acts were done by individual government agents acting to engineer intense terror on young Jocelin
24 and her family as a means of deterring irregular immigration along the southern border.
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1 This exact government argument that Plaintiffs' complaint should be dismissed because
2 the torts at issue were the conduct of the government at large, and not of individual agents of the
3 government, was recently rejected by this Court in a parallel family separation case, and the Court
4 should likewise do so again in the instant case for the same reasons expressed in its ruling last
5 month. *F.R.*, 2022 U.S. Dist. LEXIS 130606 at *17.

7 CONCLUSION

8 Young Jocelin and her father suffered serious and crippling trauma and distress when they
9 were allowed entry into the United States by Border Patrol agents so that they could be shanghaied
10 into service of the government's unconstitutional family separation policy. Their father/daughter
11 relationship, based on love, protection, and care, was torn asunder. Jocelin was treated as a
12 common criminal and purposefully held in protracted detention to prevent reunification in
13 furtherance of this despicable policy. In short, Plaintiffs, including an eight-year-old girl, were
14 subjected by the United States to extreme mental and psychological torture. The government
15 admits as much in its motion, repudiating its "family separation policy," and blaming the harms
16 suffered by the plaintiffs on the former administration. Motion to Dismiss (Doc. 15) ¶ 8.

17 Yet the government once again asks this Court to sweep this gross and unconstitutional
18 government misconduct - determined to be contrary to all norms of civilized society - under a
19 judicial rug. *Ms. L.*, 310 F. Supp. 3d at 1144-46. The government's motion for summary judgment
20 trots out old arguments that have been repeatedly been rejected by this very Court. The same
21 reasoning applies in this case, and the Court in consistently applying the same law to the same
22 arguments to reach the same result should send a message to the government to, in the interests
23 of justice, cease filing such motions, which are designed only to obfuscate its unconstitutional
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1 conduct. The government cannot reasonably admit the impropriety of its family separation policy
2 on the one hand, while denying relief for the harm occasioned by its conduct on the other.

3
4 It has been more than four years since the government tore Plaintiffs' lives apart,
5 physically, emotionally, and in spirit. They continue to suffer the serious and severe effects of
6 the government's conduct. They live in abject poverty and are unable to obtain professional help
7 to begin to remedy the government's assaults, and they are relying on the accountability provided
8 by the FTCA to heal. Rather than continue to pursue its dilatory efforts to avoid liability by means
9 repeatedly rejected by this Court and continue to try to bury the human consequences of its family
10 separation policy, the government should instead pursue justice in this case - which presents the
11 most grievous of harms occasioned by its agents - using the Court's resources to mediate this case
12 to conclusion in good faith.
13

14 DATED this 16th day of August, 2022.
15

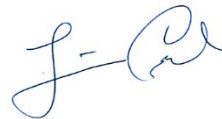
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17 /s/ Ricardo de Anda w/permission

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2022, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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